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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

NEW MEXICO,
Petitioner,

v.

CRAIG HARRIS HENSEL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW MEXICO

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QUESTIONS PRESENTED FOR REVIEW

Whether the New Mexico Court of Appeals erred in holding that Respondent Craig Hensel's constitutional right of confrontation was violated by the admission of hearsay evidence at the suppression hearing, and that the state thereby failed to prove a valid consent search.

1. Was Respondent's right of confrontation violated by the admission of hearsay evidence at the suppression hearing?
2. Did the State satisfy its burden of proving a valid consent to search?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

STATEMENT OF JURISDICTIONAL GROUNDS 2

CONSTITUTIONS, STATUTES AND RULES 2

STATEMENT OF THE CASE 3

PRESENTATION OF THE FEDERAL QUESTION BELOW 5

BASIS FOR GRANTING THE WRIT OF CERTIORARI 6

ARGUMENT 6

1. Respondent's right of confrontation was not violated by the admission of hearsay evidence at the suppression hearing 6
2. The state satisfied its burden of proving a valid consent to search 10

CONCLUSION 12

APPENDIX A-1

TABLE OF AUTHORITIES

Page

CASES:

Bowman v. Butler,
98 N.M. 357, 648 P.2d 815 (Ct. App. 1982) 11

Chapman v. United States,
365 U.S. 610 (1961) 11

Cooper v. California,
386 U.S. 58 (1967) 6, 7

Lee v. Illinois,
476 U.S. ____, 90 L.Ed.2d 514 (1986) 8

McClean v. State,
482 A.2d 101 (Del. 1984) 8

McCray v. Illinois,
386 U.S. 300 (1967) 6, 7

Medler v. Henry,
44 N.M. 275, 101 P.2d 398 (1940) 9

Schneckloth v. Bustamonte,
412 U.S. 218 (1973) 10

State v. Adrian,
453 P.2d 221 (Haw. 1969) 8

State v. Asbury,
701 P.2d 1189 (Ariz. Ct. App. 1984) 8

State v. Bloom,
90 N.M. 192, 561 P.2d 465 (1977) 11

State v. Kennedy,
80 N.M. 152, 452 P.2d 486 (Ct. App. 1969) 9

State v. Madrid,
91 N.M. 375, 574 P.2d 594 (Ct. App. 1978) 10

State v. Mascarenas,
80 N.M. 537, 458 P.2d 789 (1969) 8

State v. Rascon,
89 N.M. 254, 550 P.2d 266 (1976) 6

Page

State v. Self,
88 N.M. 37, 536 P.2d 1093 (Ct. App. 1975) 8

State v. Wilson,
443 A.2d 252 (N.J. Law Div. 1981) 8

Strickland v. Roosevelt County Rural Elec. Coop.,
99 N.M. 335, 657 P.2d 1184 (Ct. App. 1982), *cert. denied,* 463 U.S. 1209. 9

Stoner v. California,
376 U.S. 483 (1964) 11

United States v. Boyce,
797 F.2d 691 (8th Cir. 1986) 7

United States v. Lee,
541 F.2d 1145 (5th Cir. 1976) 8

United States v. Matlock,
415 U.S. 164 (1974) 6, 7, 8, 10

United States v. Merritt,
695 F.2d 1263 (10th Cir. 1982), *cert. denied,* 461 U.S. 916 (1983) 8

United States v. Raddatz,
447 U.S. 667 (1980) 6, 7, 8

CONSTITUTIONS, STATUTES AND RULES

U.S. Const. Amend. VI 2

28 U.S.C. § 1257(3). 2

N.M. Stat. Ann. § 45-3-709 (1978) 2, 11

N.M. Stat. Ann. § 45-3-711 (1978) 2, 11

N.M. Stat. Ann. § 30-31-20 (Repl. Pamp. 1980) 3

N.M.R. Evid. 11-104(A) 3, 6

N.M.R. Evid. 11-1101(D)(1) 3, 6

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CRAIG HARRIS HENSEL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW MEXICO

The State of New Mexico, Respondent, respectfully requests that this Court issue its Writ of Certiorari to the Court of Appeals of New Mexico, reversing that court's decision and affirming the judgment and sentence of the trial court.

OPINION BELOW

The opinion of the New Mexico Court of Appeals is a formal opinion, but has not yet been published. A copy is reprinted in the appendix to this petition.

STATEMENT OF JURISDICTIONAL GROUNDS

The New Mexico Court of Appeals issued its final opinion, pursuant to rehearing, on April 14, 1987. The New Mexico Supreme Court denied the state's petition for writ of certiorari on May 20, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3). This petition will be timely filed if presented on or before July 20, 1987.

CONSTITUTION, STATUTES AND RULES

U.S. Const. Amend. VI (Confrontation Clause)

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

N.M. Stat. Ann. Section 45-3-709 (1978)

Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by the personal representative will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is necessary for purposes of administration. The personal representative shall take all steps reasonably necessary for the management, protection and preservation of the estate in his possession. He may maintain an action to recover possession of property or to determine the title thereto.

N.M. Stat. Ann. Section 45-3-711 (1978)

Until termination of his appointment, a personal representative has the same power over the title to property of

the estate that an absolute owner would have, subject only to his trust to use and apply the property for the benefit of creditors and others interested in the estate. This power may be exercised without notice, hearing or order of court.

N.M.R. Evid. 11-104

A. Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to the provisions of Paragraph B. In making his determination he is not bound by the Rules of Evidence except those with respect to privileges.

N.M.R. Evid. 11-1101

D. Rules inapplicable. The rules (other than those with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the judge under Rule 11-104.

STATEMENT OF THE CASE

Respondent pleaded guilty to one count of trafficking in a controlled substance by manufacturing the substance, contrary to N.M. Stat. Ann. 30-31-20 (Repl. Pamp. 1980). Prior to entering his plea, he filed a motion to suppress evidence, reserving the right to appeal from denial of that motion.

At a hearing on the motion, Officer Rogers of the state police testified that Respondent's mother, Mrs. Charlotte Hensel, consulted the state police in Roswell about the possibility of her son Craig having stolen her car. She told Officer Rogers that she believed he could be found at a premises known as the Scully Ranch in Fort Sumner. The property had belonged to her sister, who was deceased, and she, Mrs.

Hensel, was the personal representative of the estate. She told Officer Rogers that nobody had permission to be on the premises, and that Craig had probably stolen a key. She also stated that he would probably be in possession of drugs. (Tr. 10-12, 31-32, 39).

Mrs. Hensel signed an Auto Theft Affidavit form (Tr. 131) and a Form for Consent to Search (Tr. 132). Officer Rogers transmitted the information to Officer Bryant in Fort Sumner, who picked up defendants Craig and Ross Hensel. Following a telephone conversation at the police office where Officer Bryant and Ross Hensel spoke with Mrs. Hensel, and in which she again requested a search of the house, (Tr. 68-71), Officer Bryant, Sheriff Turnbow, and Craig and Ross Hensel returned to the house where a search was conducted. The search produced evidence of the manufacture of a controlled substance, methamphetamine. (Tr. 72-78). Respondent was thereafter charged by Criminal Information with one count of trafficking in a controlled substance by the manufacture of the substance.

At a hearing on Respondent's motion to suppress, Officers Rogers and Bryant and Sheriff Turnbow testified for the state, and Craig Hensel testified in his own behalf. Mrs. Hensel did not testify, but Officers Rogers and Bryant testified as to her statements, and the Auto Theft Affidavit and the Form for Consent to Search were received in evidence. (Tr. 38). Craig Hensel testified that the house belonged to him, and that he did not consent to a search. (Tr. 121-122, 125). Ross Hensel did not testify. At the conclusion of the hearing, the district court found a valid consent to search by Mrs. Hensel, and denied the motions to suppress. Respondent thereafter pleaded guilty.

On appeal, and following consolidation of the cases, the court of appeals initially affirmed. It ruled that Defendant Ross Hensel had demonstrated no legitimate expectation of

privacy in the premises, and, with respect to Defendant Craig Hensel, that Mrs. Hensel had given a valid consent to search. On Respondent's motion for rehearing, the court ordered supplemental briefs on the issue of whether common authority is required for a third-party search, and whether a third party can consent to a search when the target of the search is present.

Following supplemental briefing, the court of appeals withdrew its original opinion and substituted a new opinion. It affirmed Defendant Ross Hensel's conviction on the basis of his lack of standing. It reversed, however, as to Defendant Craig Hensel, holding that the district court erred in finding that Mrs. Hensel had authority to consent to the search. It based this holding on the premise that Officer Rogers' testimony as to what Mrs. Hensel had told him violated Respondent's right of confrontation. The issue of confrontation, while addressed in the original briefs, had not been addressed in the supplemental briefs as the court of appeals had directed briefing only on those issues specified above. (*See* Brief in Chief at 15-16; Answer Brief at 18-19).

PRESENTATION OF THE FEDERAL QUESTION BELOW

Respondent objected at the suppression hearing to the use of Mrs. Hensel's out-of-court statements, and both parties addressed the issue of confrontation in their briefs to the court of appeals. The initial opinion of the court of appeals did not address the confrontation issue, but the opinion substituted on rehearing was based on this constitutional premise. Petitioner appealed this determination to the New Mexico Supreme Court by way of Petition for Writ of Certiorari, which was denied.

BASIS FOR GRANTING THE WRIT OF CERTIORARI

The New Mexico Court of Appeals erred in holding that the admission of hearsay statements at a suppression hearing violated Respondent's confrontation rights. This holding conflicts with New Mexico Rules of Evidence 11-104(A) and 11-1101(D)(1), and with the opinions of the United States Supreme Court in *United States v. Raddatz*, 447 U.S. 667 (1980); *United States v. Matlock*, 415 U.S. 164 (1974); *McCray v. Illinois*, 386 U.S. 300 (1967); and *Cooper v. California*, 386 U.S. 58 (1967). In addition, the evidence, both with and without Mrs. Hensel's statements, supports the trial court's determination of her authority to consent.

ARGUMENT

1. Respondent's right of confrontation was not violated by the admission of hearsay evidence at the suppression hearing.

In its substitute opinion the court of appeals bypassed the issue of Mrs. Hensel's authority to consent by holding that admission of her out-of-court statements violated Respondent's right of confrontation. This holding misconstrues the nature of a suppression hearing and the applicability of constitutional rights, as determined by this Court.

A suppression hearing does not involve the question of guilt or innocence. Indeed, its function, quite apart from guilt and innocence, is the determination of whether facts, admittedly accurate, are to be used in the trial itself. *See State v. Rascon*, 89 N.M. 254, 261, 550 P.2d 266 (1976). Since it involves questions of fact preliminary to admissibility of evidence, the rules of evidence specifically sanction the reception of hearsay evidence. N.M.R. Evid. 11-104(A) and 11-1101(D)(1).

The United States Supreme Court, addressing a due process claim involved in referring a suppression hearing to a magistrate, observed the nature of a suppression hearing as follows:

> Of course, the resolution of a suppression motion can and often does determine the outcome of a case; this may be true of various pretrial motions. We have repeatedly pointed out, however, that the interests underlying a voluntariness hearing do not co-incide with the criminal law objective of determining guilt or innocence . . . .
>
> This Court on other occcasions has noted that the interests at stake in a suppression hearing are of lesser magnitude than those in the criminal trial itself. At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial . . . . We conclude that the process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at the trial itself.

United States v. Raddatz, 447 U.S. 667, 677-79 (1980).

In *McCray v. Illinois*, 386 U.S. 300, 313 (1967), the Court specifically held that the Sixth Amendment right of confrontation is not violated by failure to produce an informant at a preliminary hearing. The Court relied on *Cooper v. California*, 386 U.S. 58 (1967), in which it said the contention was "absolutely devoid of merit." *Id.* at 62 n.2. Finally, in considering the admissibility of the third-party consenter's out-of-court statements about her authority to consent in *Matlock*, the Court noted that it had specifically rejected confrontation claims in *McCray*. *United States v. Matlock*, 415 U.S. 164, 174-75 (1974).

The issue was squarely presented recently in *United States v. Boyce*, 797 F.2d 691 (8th Cir. 1986). In that case, the

officer who stopped, searched and arrested the defendant, and whose observations led to a finding of probable cause, did not testify at the suppression hearing. Instead, his statements were presented through another officer who had not been present. The eighth circuit rejected the defendant's confrontation claim. Relying on *Raddatz* and *Matlock*, the court concluded that the interests involved in a suppression hearing are of a lesser magnitude than those involved in the trial itself, and that the right of confrontation does not apply to the same extent. *Id.* at 693; *cf. United States v. Merritt*, 695 F.2d 1263, 1269 n.10 (10th Cir. 1982), *cert. denied*, 461 U.S. 916 (1983) (hearsay establishing reasonable suspicion admissible at suppression hearing); *United States v. Lee*, 541 F.2d 1145, 1146 (5th Cir. 1976) (same rule with respect to probable cause determination).

The cases cited by the court of appeals in its substitute opinion do not compel a different result. None of the cases involved a suppression hearing. The case of *State v. Mascarenas*, 80 N.M. 537, 458 P.2d 789 (1969) concerned a preliminary hearing in which the objectives were far different from those of a suppression hearing. Three cases cited by the court of appeals all involved evidence at the trial itself: *State v. Self*, 88 N.M. 37, 536 P.2d 1093 (Ct. App. 1975); *McClean v. State*, 482 A.2d 101 (Del. 1984); *State v. Adrian*, 453 P.2d 221 (Haw. 1969). The case of *State v. Asbury*, 701 P.2d 1189 (Ariz. Ct. App. 1984), involved a sentencing hearing, and the defendant was denied cross-examination of victims who actually testified. The case of *State v. Wilson*, 443 A.2d 252 (N.J. Law Div. 1981), does not support the contention of the court of appeals.

The state also contends that the purposes of confrontation were, in any event, satisfied in this case. This Court recently held in *Lee v. Illinois*, 476 U.S.__, 90 L.Ed.2d 514, 527-28 (1986) that confrontation concerns may be satisfied if the statement at issue bears sufficient indicia of reliability.

The properly admitted evidence, completely apart from Mrs. Hensel's out-of-court statements, supports the trial court's findings. It was the state's burden to prove a valid consent to search. The precise issue involved was Mrs. Hensel's authority to consent. This was established by the court's taking judicial notice, without objection, of her status as personal representative. Respondent claims that this authority alone was insufficient in light of his claim of possession of the premises. Craig's own testimony was inconclusive and conflicting. While he claimed his mother had given him the property, he produced no deed, lease, or other indicia of title. He testified to fixing the place up, but specified only boarding up the pump house. He admitted that he occupied the premises only on a sporadic basis, maintaining a separate residence in Roswell, that he received no mail at the premises and paid no utility bills. He admitted that the estate took care of the utilities and that Mrs. Hensel had had the electricity turned on. (Tr. 122-24). In light of his admissions concerning his mother's authority and the inconclusive evidence of his own authority, the court was not required to believe his testimony that he had permission to occupy the property. *Medler v. Henry*, 44 N.M. 275, 283-84, 101 P.2d 398 (1940); *Strickland v. Roosevelt County Rural Elec. Coop.*, 99 N.M. 335, 341-42, 657 P.2d 1184 (Ct. App. 1982), *cert. denied*, 463 U.S. 1209.

Independent evidence also supported Mrs. Hensel's claim of authority. (Answer Brief at 3). Officer Bryant testified that the house was abandoned. He further testified that while it was obvious someone was in it, he would not say it was being used as a permanent residence. (Tr. 62-63, 75). Sheriff Turnbow testified that nobody had lived in the house for five or six years. He stated that while somebody was occupying the house, they were not living there. (Tr. 112-115). These independent statements based on personal observations of the witnesses, together with Craig's admissions concerning the

estate's authority and his equivocation about his own authority, serve as indicia of reliability supporting Mrs. Hensel's out-of-court statements.

2. The state satisfied its burden of proving a valid consent to search.

The state bears the burden of proving a consent to search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); *State v. Kennedy*, 80 N.M. 152, 154, 452 P.2d 486 (Ct. App. 1969). When consent to search is obtained from a third party, the state must show that the third party had authority to consent. The Supreme Court addressed this issue in *United States v. Matlock*, 415 U.S. 164 (1974), and held that the state "may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *Id.* at 171. In a footnote, the Court further explained the meaning of "common authority" as resting on "mutual use of the property by persons generally having joint control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Id.* at 171 n.7.

Matlock thus established two bases for third-party consent: those co-inhabitants with common authority, and those persons with other sufficient relationship to the premises. In *State v. Madrid*, 91 N.M. 375, 574 P.2d 594 (Ct. App. 1978), the New Mexico Court of Appeals was concerned with the second basis, since the evidence did not show that the consenter was a co-inhabitant with common authority. Instead, the court held that the estranged wife of the defendant possessed other sufficient relationship to the premises by virtue of her statutory right to be on the premises, her possession of a key, and her use of the premises in leaving property there. *Id.* at 378.

In the present case, Mrs. Hensel had a statutory right to possession of the premises. Without objection, the court took judicial notice of the records in the probate case of Mrs. Hensel's sister, in which Mrs. Hensel was appointed personal representative of the estate. (Tr. 42). Pursuant to Section 45-3-709 N.M.S.A. (1978), the personal representative has a right to possession of the premises. Section 45-3-711 provides that the personal representative has the same power over the title to the property as would an absolute owner. The court of appeals has held that these provisions of the probate code not only confer a right of possession on the personal representative, but impose a fiduciary duty to take possession of the property, protect it, and account for it. *Bowman v. Butler,* 98 N.M. 357, 360, 648 P.2d 815 (Ct. App. 1982).

Pursuant to New Mexico probate law, Mrs. Hensel had authority over the property, and under *Madrid*, this authority constituted "other sufficient relationship to the premises" to authorize consent to search. That Craig Hensel claimed the property was his does not compel a different result since conflicts in the evidence are for the trial court. *State v. Bloom,* 90 N.M. 192, 194, 561 P.2d 465 (1977). Mrs. Hensel disputed her son's right to be there. This distinguishes *Stoner v. California,* 376 U.S. 483 (1964), and *Chapman v. United States,* 365 U.S. 610 (1961), in both of which the defendant was a legitimate, undisputed lessee of the premises. In its initial opinion, the court of appeals correctly held that the evidence supported a finding of Mrs. Hensel's authority to consent.

Finally, the state contends that any error was harmless. Assuming that Respondent's confrontation rights were violated, the remaining evidence was sufficient to support the trial court's finding of Mrs. Hensel's authority. The uncontested evidence of her status as personal representative, the equivocal statements by Craig, and the testimony of Officers

Bryant and Turnbow were sufficient to satisfy the state's burden in the suppression hearing.

CONCLUSION

Petitioner requests this Court to grant the Petition for Writ of Certiorari, reverse the judgment of the New Mexico Court of Appeals, and affirm the judgment of the trial court.

Respectfully submitted,

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July 20, 1987

APPENDIX

IN THE COURT OF APPEALS OF
THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellee,
vs.
CRAIG HARRIS HENSEL and
ROSS JOSEPH HENSEL,
Defendants-Appellants.

Nos. 9088 & 9189
Consolidated

APPEAL FROM THE DISTRICT COURT
OF DE BACA COUNTY
STANLEY F. FROST, Judge
(Filed April 14, 1987)

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Exhibit A

OPINION

GARCIA, Judge.

We granted defendants' motion for rehearing to reconsider the issue of whether more than mere ownership is required for a third party to validly consent to a warrantless search. As a result of the rehearing, we withdraw our opinion filed January 8, 1987 and substitute the following.

Defendants, Craig Hensel (Craig) and Ross Hensel (Ross), appeal the trial court's order denying their motions to suppress physical evidence obtained as a result of an allegedly illegal search and seizure. Both pled guilty to manufacturing a controlled substance following the trial court's denial, but expressly reserved the right to appeal the orders. On the state's motion, we consolidated the cases for appeal. Because the confrontation issue is dispositive of Craig's appeal, we do not address the remaining issues argued by him. We reverse his conviction for the reasons that follow. The disposition of Ross' appeal, however, differs from Craig's. Because we find that Ross does not have standing to challenge the illegal search and seizure, we affirm his conviction.

FACTS

Craig and Ross Hensel are brothers. Along with two other co-defendants, they were arrested following the warrantless search of a house located on the Scully Ranch (Ranch). The police officers conducted the search pursuant to defendants' mother's (Mrs. Hensel) consent. Mrs. Hensel is the personal representative of the estate of which the Ranch is an asset. It is undisputed that Mrs. Hensel has never lived in the house or otherwise used the premises for any purpose.

Officer Rogers testified that Mrs. Hensel came to the state police headquarters in Roswell claiming that Craig had stolen her car and requested assistance in recovering it. Mrs. Hensel

indicated that the car could probably be found on the Ranch property where she believed Craig was staying. Mrs. Hensel also told Officer Rogers that Craig would probably be in possession of illegal drugs. She signed an affidavit and a consent to search form, granting the police permission to enter the property to search for the car and drugs. The Ranch is located in the Fort Sumner area, some eighty-seven miles from Roswell. Officer Rogers testified Mrs. Hensel told him the Ranch was abandoned; that Craig did not have permission to be on the property; and that Craig had probably stolen the key to the house from her. Mrs. Hensel did not testify at the hearing.

Craig testified that his mother had given him the Ranch as his share of the estate. He also testified that he resides at the house on a sporadic basis, has items of personal property in the house and has performed repairs and maintenance on the house and surrounding out-buildings. He admitted that he receives no mail at the Ranch and the estate pays all utility bills.

Ross did not testify at the hearing and there is no indication in Craig's testimony that Ross had his mother's or Craig's permission, explicit or implicit, to reside at or otherwise occupy the house. There was no evidence of any kind indicating that Ross was in fact residing at or otherwise occupying the house.

Defendants challenge the admission of Officer Rogers' testimony concerning Mrs. Hensel's statements on the grounds of inadmissible hearsay. They argue that Mrs. Hensel's out-of-court statements concerning her authority to consent were neither reliable nor credible and that she had a motive to lie to Officer Rogers, i.e., she wanted the police to get her car from Craig and to secure the removal of Craig from the house. The trial court admitted Officer Rogers' testimony on the assumption that it was offered to show Officer Rogers' state of mind and not to prove the truth of the matters asserted.

At the conclusion of the hearing, the trial court stated that "[t]he resolution of this matter depends upon a determination as to whether or not we have a valid consent to search the [Ranch] home." The trial court subsequently found that Mrs. Hensel had the authority to validly consent to the warrantless search and that neither Craig nor any of the other defendants arrested at the Ranch had "exclusive use of the property." The trial court based its findings of valid authority to consent in Mrs. Hensel on the fact that, as personal representative of the estate, she stood in the position of an owner.

DISCUSSION: ROSS' APPEAL

A defendant may claim the benefits of the exclusionary rule only if he demonstrates a violation of his fourth amendment rights. *See State v. Donaldson,* 100 N.M. 111, 666 P.2d 1258 (Ct.App.1983). Here, Ross failed to show at the suppression hearing that he had a legitimate expectation of privacy in the premises searched. *See State v. Waggoner,* 97 N.M. 73, 636 P.2d 892 (Ct.App.1981). A person who is aggrieved by an illegal search and seizure only through the introduction of evidence secured by a search of a third person's premises or property has not suffered an infringement of his fourth amendment rights. *Id.* Mere presence is insufficient to give rise to a legitimate expectation of privacy in the premises. *Id.* (citing *Rakas v. Illinois,* 439 U.S. 128 (1978)). Since Ross did not enjoy a legitimate expectation of privacy in the premises searched, we affirm the court's denial of his motion to suppress. *State v. Beachum,* 83 N.M. 526, 494 P.2d 188 (Ct.App.1972) (trial court will be affirmed on appeal if right for any reason).

CRAIG'S APPEAL

As opposed to the situation in Ross' case, the resolution of Craig's motion to suppress depends upon a determination of whether Mrs. Hensel, as a third party, could consent to the warrantless search of the house. *See United States v. Matlock,*

415 U.S. 164 (1974); *State v. Madrid*, 91 N.M. 375, 574 P.2d 594 (Ct.App.1978). The trial court found that the state made a sufficient showing that Mrs. Hensel had authority to consent to the search. We disagree.

The mere fact that Mrs. Hensel stands in the position of an owner of the Ranch is, in itself, not sufficient to support a finding that she had the authority to consent to the warrantless search of the premises. The authority which justifies third party consent does not rest upon the law of property, but rests rather on the mutual use of the property by persons generally having joint access or control. *United States v. Matlock*, at 171, n.7 (1974) (citing *Chapman v. United States*, 365 U.S. 610 (1961)); *Stoner v. California*, 376 U.S. 483 (1964); *State v. Madrid*. The only other evidence presented to support a finding that Mrs. Hensel had the authority to consent was the testimony of Officer Rogers, which was based exclusively on the out-of-court statements of Mrs. Hensel.

Defense counsel objected to Officer Rogers' testimony concerning statements made to him by Mrs. Hensel. The trial court initially overruled the objection and allowed Officer Rogers to testify. As the officer continued to relate statements made to him, defense counsel again objected on the grounds of hearsay and that defendant was being deprived of the right of confrontation.

We agree with the state's argument that the Rules of Evidence are inapplicable to suppression hearings, *see* SCRA 1986, Rule 11-1101(D)(1), since hearings on motions to suppress require the "determination of questions of fact preliminary to admissibility of evidence." J. Weinstein, *Federal Rules of Evidence – A Judge's View*, 174 N.Y.L.J. 1, 4 (1975), reprinted in H. Gilmore, *Evidence*, at 1-14 (1973). This view, however, does not answer defendant's contention that the statements are still inadmissible. In addition to the hearsay objection, defendant raised a sixth amendment confrontation claim.

The fact that the statements were not barred by the Rules of Evidence does not make them *per se* admissible.

A factual issue is raised as to whether Craig was lawfully utilizing or occupying the premises. Where important facts are to be determined by the factfinder and the burden of proof is on the state, it would be fundamentally unfair to allow the state to prove such facts on purely hearsay evidence, denying the accused the opportunity to cross-examine the declarant. *Cf. State v. Asbury*, 145 Ariz. 381, 701 P.2d 1189 (App.1984); *McLean v. State*, 482 A.2d 101 (Del.1984); *State v. Wilson*, 183 N.J.Super. 86, 443 A.2d 252 (1981); *State v. Self*, 88 N.M. 37, 536 P.2d 1093 (Ct.App.1975).

By this opinion, we do not intimate that an accused is guaranteed the right to confront all out-of-court declarants in any suppression hearing. The denial of the right of confrontation may be harmless in certain circumstances. *State v. Martinez*, 99 N.M. 48, 653 P.2d 879 (Ct.App.1982). *See also State v. Beck*, 97 N.M. 312, 639 P.2d 599 (Ct.App.1982). However, on the facts of this case, it would be fundamentally unfair to find that Craig's mother validly consented to the warrantless search, while denying Craig the opportunity to confront her in court. The mere fact that Mrs. Hensel stands in the position of an owner of the Ranch, in itself, is insufficient to support a finding that she had the authority to consent to a warrantless search of the premises. *United States v. Matlock*.

We hold that Craig was denied his constitutional right to confront the key witness against him. *See Mascarenas v. State*, 80 N.M. 537, 458 P.2d 789 (1969). As previously noted, the resolution of the motion to suppress depended upon a determination of whether or not Mrs. Hensel validly consented to a search of the Ranch house. The essential part of the case against Craig is contained in allegedly out-of-court statements made by his mother, as related by Officer Rogers. At no time did Craig

have an opportunity to cross-examine Mrs. Hensel concerning her authority to consent to a warrantless search. We are hard-pressed to find a more extreme case than this one in which an accused was denied the right of confrontation. *See State v. Adrian*, 51 Haw. 125, 453 P.2d 221 (1969).

CONCLUSION

We affirm the trial court's order denying Ross' motion to suppress and his conviction of trafficking in a controlled substance by manufacture. We reverse Craig's conviction and the order denying his motion to suppress. Craig's case is remanded to the district court with instructions to grant him a new suppression hearing and redetermine the lawfulness of Craig's occupancy of the Ranch house and Mrs. Hensel's authority to consent to the warrantless search of the Ranch property.

IT IS SO ORDERED.

/s/ Lorenzo F. Garcia
LORENZO F. GARCIA, Judge

WE CONCUR:

/s/ Thomas A. Donnelly,
THOMAS A. DONNELLY, Chief Judge

/s/ A. Joseph Alarid
A. JOSEPH ALARID, Judge

RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
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(9)

No. 87-162

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

NEW MEXICO,

Petitioner,

vs.

CRAIG HARRIS HENSEL,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW MEXICO

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26 pp

RESPONSE TO
QUESTIONS PRESENTED FOR REVIEW

1. The New Mexico Court of Appeals did not err in holding that Respondent Craig Hensel's constitutional rights were violated by the admission of hearsay evidence at the suppression hearing.

2. The State did not satisfy its burden of proving a valid consent to search.

   a. Common authority, not mere ownership is required for a third party to provide a valid consent to search.

   b. An absent third party cannot consent to a search when the target of the search is present.

TABLE OF CONTENTS

Page

RESPONSE TO QUESTIONS PRESENTED. i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE. 6

BASIS FOR DENYING THE WRIT OF CERTIORARI 6

ARGUMENT 6

1. The New Mexico Court of Appeals did not err in holding that Respondent Craig Hensel's constitutional rights were violated by the admission of hearsay evidence at the suppression hearing. 6

2. The state did not satisfy its burden of proving a valid consent to search. 11

   a. Common authority, not mere ownership is required for a third party to provide a valid consent to search. 11

   b. An absent third party cannot consent to a search when the target of the search is present. 16

CONCLUSION 20

APPENDIX . . . . . .

TABLE OF AUTHORITIES

CASES: Page

California v. Green,
399 U.S. 149 (1970). 8

California v. Haskett,
640 P.2d 776 (Cal. 1982) 17

Chambers v. Mississippi,
410 U.S. 284, (1973) 7

Chapman v. United States,
365 U.S. 610 (1961). 6, 12, 13, 14

Dutton v. Evans,
400 U.S. 74, (1970). 8

Johnson v. United States
333 U.S. 10, (1948). 14, 16

Lucero v. Donovan,
354 F.2d 16 (9th Cir. 1965). 17, 20

Mancusi v. Stubbs,
408 U.S. 204, (1972) 7

Mattox v. United States,
156 U.S. 237 (1895). 8

Mincey v. Arizona,
437 U.S. 385, (1978) 16

New Mexico v. Hensel,
__ N.M.__, 738 P.2d 126 (Ct.App. 1987) 7, 10, 12

New Mexico v. Johnson,
85 N.M. 465, 513 P.2d 399 (Ct. App. 1973). . . . 13, 15

New Mexico v. Larson,
94 N.M. 795, 617 P.2d 1310 (1980). 15

New Mexico v. Madrid,
91 N.M. 375, 574 P.2d 594 (Ct. App. 1978). . .7, 13, 15

New Mexico v. Mascarenas,
86 N.M. 692, 526 P.2d 1285 (Ct. App. 1974) . . 13, 15

New Mexico v. Waggoner,
97 N.M. 73, 636 P.2d 892 (Ct. App. 1981) 16

New York v. Cosme,
397 N.E.2d 1319 (Ct. App. N.Y. 1979) 17

Ohio v. Roberts,
448 U.S. 56 (1980) 7, 8

Oregon v. Frame,
609 P.2d 831 (Or. App. 1980) 17

Pointer v. Texas,
380 U.S. 400 (1965). 7

Rakas v. Illinois,
439 U.S. 128 (1978). 16

Silva v. Florida,
344 So.2d 559 (Fla. 1977). 17, 19, 20

Stoner v. California,
376 U.S. 483 (1964). 7, 12, 13, 14, 18

United States v. Boyce,
797 F.2d 691 (8th Cir 1986). 8, 9

United States v. Impink,
728 F.2d 1228 (9th Cir. 1984). 17, 18, 19

United States v. Matlock,
415 U.S. 164 (1974) . . .6, 8, 9, 10, 12, 13, 16, 17. 18

United States v. Poole,
307 F.Supp. 1185 (E.D. La. 1969) 19

Unites States v. Robinson,
479 F.2d 300 (7th Cir. 1973) 17, 19

United States v. Sumlin,
567 F.2d 684 (6th Cir. 1977) 17

CONSTITUTIONS, STATUTES AND RULES

United States Constitution Amendment IV

> In all criminal prosecutions the accused shall enjoy the right. . .to be confronted with witnesses against him. . .

No.87-162

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

NEW MEXICO,

Petitioner,

vs.

CRAIG HARRIS HENSEL,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW MEXICO

STATEMENT OF THE CASE

The state of New Mexico has petitioned this Court for a Writ of Certiorari to the New Mexico Court of Appeals. Craig Hensel had appealed his conviction of manufacturing a controlled substance to the New Mexico Court of Appeals following a Plea and Disposition Agreement, in the Tenth Judicial District Court wherein the Respondent specifically reserved his right to appeal the trial court's decision refusing to suppress evidence.

The trial court at the suppression hearing held that Craig Hensel had standing to contest the validity of the search (Tr. 128). The trial court, having found standing, thereafter decided that a valid consent to search was given by Charlotte Hensel to search the home occupied by Craig Hensel. (Tr. 130). The New Mexico Court of Appeals reversed the trial court and remanded the case for another suppression hearing.

On October 3, 1985, Craig Hensel was arrested for manufacturing a controlled substance. The arrest was a result of a warrantless search of Craig Hensel's residence conducted by Officer David Bryant of the New Mexico State Police and the DeBaca County Sheriff, Earl Turnbow. The search was conducted without a search warrant and without consent of any occupant of the premises. The state based the lawfulness of the search on the alleged consent of Craig Hensel's mother, who was approximately eighty-seven miles away in Roswell, New Mexico at the time the consent to search was given.

All testimony concerning Mrs. Hensel's consent to search was given by officers of the New Mexico State Police Department. At the suppression hearing, Officer Larry Rogers of the Roswell Office of the State Police Department testified that on October 3, 1985, Craig Hensel's "alleged" mother and sister came into the State Police Department at Roswell complaining that Mrs. Hensel's car had been stolen by Craig Hensel. (Tr. 5). Officer Rogers testified he had neither met Mrs. Hensel nor her daughter prior to that day. (Tr. 5).

Mrs. Hensel signed an Auto Theft Affidavit Form for the automobile. (Tr. 131). Officer Rogers conceded that numerous statements on the Theft Affidavit were false. (Tr. 20, 151). According to Officer Rogers, Mrs. Hensel stated her son may be at a home, which she referred to as the Scully Ranch. (Tr. 10, 11). Officer Rogers stated Charlotte Hensel agreed to sign a consent to the search of the Scully Ranch. (Tr. 11, 12, 132). The consent form was to allow the state police to search for the vehicle at the Scully Ranch and obtain possession of the vehicle. (Tr. 13, 14, 24, 50).

Mrs. Hensel told Officer Rogers she had power of attorney over the Scully Ranch and the ranch was a part of the estate of her deceased sister, Harriett Scully. (Tr. 39). At the time Mrs. Hensel signed the consent to search, she had provided no documentation to Officer Rogers showing any property interest in the Scully Ranch. (Tr. 31). The trial court took judicial notice that Charlotte Hensel was Personal Representative of Harriett Scully's estate. (Tr. 42).

Officer Rogers informed the state police officer in DeBaca County, Officer Bryant, that a complaint for a stolen car had been signed by Mrs. Hensel and her daughter. (Tr. 43, 44). Officer Rogers also informed Officer Bryant that a written consent to search the Scully Ranch had been signed by Mrs. Hensel (Tr. 44). At approximately 5:50 p.m. on October 3, 1985, Officer Bryant observed the alleged stolen vehicle. (Tr. 64). Upon stopping the car, Officer Bryant found Craig Hensel's brother, Ross Hensel, driving the vehicle. (Tr. 65). Officer Bryant was advised by Ross Hensel that the vehicle was not stolen. (Tr. 65, 66).

Officer Bryant and Ross Hensel then drove to the Scully Ranch to get Craig Hensel. (Tr. 66, 67). Upon their arrival, Craig Hensel exited the house and joined his brother and Officer Bryant. (Tr. 67). After informing Craig Hensel of the situation, Officer Bryant followed Ross Hensel and Craig Hensel to the sheriff's office in Fort Sumner. (Tr. 67, 68).

At the sheriff's office, Officer Bryant spoke by telephone with a woman, who he believed was Mrs. Hensel. (Tr. 69). Officer Bryant could not remember whether or not Mrs. Hensel was intoxicated but did not dispute that he told the Clovis dispatcher that Mrs. Hensel was drunk and to forget about it. (Tr. 102, 103, 133).

Mrs. Hensel refused to come to Fort Sumner after the alleged stolen vehicle. (Tr. 70). She advised Officer Bryant to have her sons drive the vehicle back to Roswell. (Tr. 70).

Officer Bryant then requested Craig and Ross Hensel to return the vehicle to Roswell. (Tr. 71. 72) Officer Bryant stated he never requested Ross Hensel's or Craig Hensel's permission to search the Scully Ranch. (Tr. 101, 102).

Despite Mrs. Hensel's request to allow Craig Hensel and Ross Hensel to return to Roswell and neither brother being under arrest, Officer Bryant and Sheriff Turnbow followed Ross and Craig Hensel to the Scully Ranch. (Tr. 72). They followed the brothers despite Officer Bryant's belief that nothing would be found if they searched the ranch. (Tr. 72, 73).

Officer Bryant obtained oral consent from Mrs. Hensel to check the Scully Ranch and stated he was relying upon this oral consent from Mrs. Hensel to proceed with the subsequent warrantless search. (Tr. 99). Officer Bryant did not know Mrs. Hensel (Tr. 99), or whether she was credible or reliable. (Tr. 90). Officer Bryant never testified to having any knowledge of Mrs. Hensel's ownership or relationship to the premises. Further, there is nothing in the record showing he received any information from Officer Rogers as to Mrs. Hensel's relationship to the premises. Also, he had never seen Mrs. Hensel at the Scully Ranch. (Tr. 93).

Upon reaching the Ranch, Officer Bryant and Sheriff Turnbow saw Craig Hensel and his brother enter the house. (Tr. 72). Officer Bryant and Sheriff Turnbow immediately entered the home, without a search warrant or a consent to search from any person in the home. (Tr. 72, 73).

Officer Bryant stated all of the windows were covered with blankets or a drape type material. (Tr. 74). An air mattress, clothes, suitcases, luggage and different items were in one room. (Tr. 74). The clothing in the house was Craig Hensel's size, (Tr. 100, 101) and in the kitchen was a table and a chair. (Tr. 75). He also indicated that there were pots, pans and food in the house. (Tr. 109).

Officer Bryant had previously met Craig Hensel at a drug store owned by Harriett Scully. (Tr. 100). Craig Hensel had been selling property from the drug store and had been writing down the amount of each item that was sold. (Tr. 109). It was also Officer Bryant's opinion that Craig Hensel had been living there for more than one day. (Tr. 106). Officer Bryant testified that there was some recent construction at the well house and Craig Hensel had told him at the sheriff's office that he had been fixing the place up. (Tr. 106).

Sheriff Earl Turnbow was not aware of Mrs. Hensel ever occupying the Scully home. (Tr. 115). He conceded that the Defendants were occupying the Scully Ranch. (Tr. 115). He also testified that he had a deputy, Champ Landrum, who lived on the adjoining property and was available to be witness. (Tr. 114, 115).

Craig Hensel testified at the suppression hearing that he had been living at the Scully Ranch on weekends since March, 1985 and also spent a week there on three different occasions. (Tr. 121, 122). He had a bed, tables, chairs, food, and cooking utensils in the house. (Tr. 121). He had also discussed the possible sale of the premises with Champ Summers, the deputy sheriff. His occupancy was based on an agreement with his mother. (Tr. 121). Craig Hensel stated he had done some recent repair work on the premises, including repairing the pump house. (Tr. 122).

BASIS FOR DENYING A WRIT OF CERTIORARI

The New Mexico Court of Appeals correctly held that the admission of hearsay statements at the suppression hearing violated the Defendant's confrontation rights. In addition, the Court of Appeals correctly held that, "the mere fact that Mrs. Hensel stands in the position of an owner of the ranch is, in itself, not sufficient to support a finding that she had the authority to consent to the warrantless search of the premises".

ARGUMENT

1. THE NEW MEXICO COURT OF APPEALS DID NOT ERR IN HOLDING THAT RESPONDENT, CRAIG HENSEL'S CONSTITUTIONAL RIGHT OF CONFRONTATION WAS VIOLATED BY THE ADMISSION OF HEARSAY SAY EVIDENCE AT THE SUPPRESSION HEARING.

On appeal, the Court of Appeals had originally proposed summary reversal of the trial court's order as to Craig Hensel based on the state's failure to show any evidence of Mrs. Hensel's authority over the premises. The Court of Appeals then affirmed the conviction of Craig Hensel without analysis of the common authority issue. After a Motion for Rehearing, the Court of Appeals thereafter ordered supplemental briefs on the issue of common authority and whether a third party can consent to a search when the target of the search is present.

After the supplemental briefing the Court of Appeals withdrew its original opinion and substituted a new opinion. It reversed the decision of the trial court as to Craig Hensel. In its opinion the Court of Appeals stated:

> The mere fact that Mrs. Hensel stands in the position of an owner of the Ranch is, in itself, not sufficient to support a finding that she had the authority to consent to the warrantless search of the premises. The authority which justifies third party consent does not rest upon the law of property, but rests rather on the mutual use of the property by persons generally having joint access or control. United States vs. Matlock 415 U.S. at 171, n.7, 94 S.Ct. at 993 n.7 (1974) (citing Chapman vs. United States, 365 U.S. 610,

> 81 S.Ct. 776, 5 L.Ed.2d 828 (1961)); Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964); New Mexico v. Madrid. The only other evidence presented to support a finding that Mrs. Hensel had the authority to consent was the testimony of Officer Rogers, which was based exclusively on the out-of-court statements of Mrs. Hensel.

New Mexico v. Hensel, _____ N.M. _____, 738 P.2d 126, 128 (Ct.App. 1987).

The Court of Appeals recognized that the confrontation clause does not rest on applicability of the Rules of Evidence. The court stated, "[t]he fact that the statements were not barred by the Rules of Evidence does not make them per se admissible." Hensel, 738 P.2d at, 128.

This Court has recognized that the constitutional right to confront witnesses and the concept of hearsay are separate and distinct. Ohio v. Roberts, 448 U.S. 56 (1980). The Court has consistently looked beyond mere evidentiary rules to determine whether a defendant's right to confrontation has been violated by an arbitrary or unreasonable evidentiary rule. Pointer v. Texas, 380 U.S. 400, 407 (1965); Chambers v. Mississippi, 410 U.S. 284, 299-302 (1973). The Sixth Amendment's right to confront witnesses is not absolute, but rather the "focus of the Court's concern has been to insure that there are indicia of reliability . . . and to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement." Mancusi v. Stubbs, 408 U.S. 204, 213 (1972).

In Ohio v. Roberts, 448 U.S. 56 (1980) the Court formulated a general framework of analysis when confronted with a Sixth Amendment claim. The Sixth Amendment established a rule that the prosecution must either produce or demonstrate the unavailability of the declarant whose evidence it wishes to use against the accused. Id. at 65. If the witness is shown to be unavailable, the prosecutor

must show that the hearsay to be placed before the jury has the necessary indicia of reliability. Id.

> The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection" . . . This reflects the truism that "hearsay rules and the Confrontation Clause are generally designed to protect similar values". . . and "stem from the same roots". . . It also responds to the need for certainty in a workaday world of conducting criminal trials.

Id. at 66. (citations omitted).

The heart of the confrontation clause is a practical concern of the accuracy of the truth determining process in criminal trials. Dutton v. Evans, 400 U.S. 74, 89 (1970).

The Court has interpreted the confrontation clause to bar the use of out-of-court statements unless such evidence bears intrinsic guarantees of trustworthiness or other indicia of reliability. Mattox v. United States, 156 U.S. 237 (1895); Ohio v. Roberts, 448 U.S. 56 (1980). The Federal Rules of Evidence while serving the same basic purpose, i.e. the actual determination of facts at trial, are not congruent. California v. Green, 399 U.S. 149 (1970). Evidence that may be clearly admissible under the Rules of Evidence may not be admissible under the confrontation clause. Dutton v. Evans, 400 U.S. 74 (1970).

The state in requesting a writ of certiorari relies on United States v. Matlock, 415 U.S. 164 (1974) and United States v. Boyce, 797 F.2d 691 (8th Cir. 1986). In both of these cases, the issue was whether the hearsay statements at a suppression hearing were admissible. In both cases the same analysis as used in Ohio v. Roberts was used in determining whether the hearsay was admissible.

In Boyce, the court held:

> Accordingly, the trial court may accept hearsay evidence at a suppression hearing if the court is satisfied that the statements were made and that there is nothing to raise serious doubt about their truthfulness.

United States v. Boyce, 797 F.2d at 693.

The Matlock court was faced with a very similar factual situation as the case at bar, however, the petitioner's reliance in Matlock is misplaced. In Matlock, the government contended it had received the consent to search from a co-occupant of the premises. The trial court had refused to admit the statements by the co-occupant at the respondent's suppression hearing.

The Court, in allowing the hearsay statements noted several factors showing the reliability of the statements. They were as follows:

> (1) The trial court was satisfied that the statements had in fact been made; (2) There was nothing in the record to raise serious doubts about the truthfulness of the statements; (3) Mrs. Graff harbored no hostility or bias against the respondent; (4) She testified on behalf of the respondent at the suppression hearing; (5) She was present at the premises and at the time of the search informed the officers she occupied a bedroom with the defendant; (6) She and defendant slept together in the bedroom; (7) All of her statements were corroborated by evidence that they had lived together previously, they were seen going upstairs together, the room showed all evidence of being occupied by a woman and the defendant had indicated in prior statements that he and Mrs. Graff were husband and wife; (8) Cohabitation out of wedlock is not the type of relationship one would falsely confess; (9) Mrs. Graff was a witness for the defendant and subject to cross-examination.

Matlock, at 175-177.

The Court held that under these circumstances "there was no apparent reason for the judge to distrust the evidence." Matlock, at 176.

This Matlock factual situation is sharply in contrast to the following facts presented in the case at bar.

1. Mrs. Hensel in attempting to obtain her vehicle had a reason to lie.

2. She made false statements in the Theft Affidavit.

3. There is no evidence to corroborate her statements.

4. There was no evidence of her occupancy of the premises.

5. A charge of trespass against Craig Hensel was dismissed at a preliminary hearing. (Tr. 107, 108).

6. Her statements conflict with Officer Bryant's testimony that he had seen Craig Hensel selling property belonging to the estate.

7. The state failed to call a deputy who lived next door to the premises searched.

8. The state presented no evidence contradicting the statements of Craig Hensel.

9. There was evidence of Mrs. Hensel's intoxication when she gave consent to Officer Bryant.

The Court in Matlock stated that at the suppression hearings the "judge should receive the evidence and give it such weight as his judgment and experience counsel." Matlock, at 175. Judges should be empowered to hear reliable hearsay. Matlock, n.12 at 175.

The New Mexico Court of Appeals, specifically held that an accused is not "guaranteed the right to confront all out-of-court declarants in any suppression hearing." Hensel, 738 P.2d at 129. The court after reviewing the record found that it would be "fundamentally unfair to find that Craig's mother validly consented to the search while denying Craig the opportunity to confront her in court." Id. The court further stated;

> We are hard pressed to find a more extreme case than this one in which an accused was denied the right of confrontation.

Id.

The Petitioner in its Petition for Writ of Certiorari attempts to argue that the hearsay statements bear sufficient indicia of reliability. The state attempts to attack Craig Hensel's statements as to his occupancy. Despite their opportunity to cross-examine Craig Hensel their argument is that the estate paid the utility bills, that Craig Hensel resided there only on the weekends and received no mail. The state's argument, taken to its logical conclusion would allow any landlord to consent to the search of a lessee's home if the lessee was renting a weekend vacation home, not paying the utilities, and the lessee did not receive any mail. The state had the opportunity to refute Craig Hensel's statements by simply calling the deputy sheriff who was Craig's neighbor and who was on duty that day.

Further, the state argues that independent evidence supports Mrs. Hensel's claim of authority. Petition for Writ of Certiorari, p. 9. For this argument, the petitioner states that Officer Bryant testified that the house was abandoned, then in the next sentence states that he testified that it was obvious someone was in it. The petitioner fails to explain how an abandoned house can be occupied. The petitioner then states that Sheriff Turnbow testified that nobody had lived in the house for five or six years, but he also said someone was occupying the house.

The uncontradicted evidence showed that Craig Hensel was living at the house. Officer Bryant was well aware of this occupancy, when he had picked Craig Hensel up at the Ranch to question him.

The petitioner would apparently expect the defendant to present both the state's case and the defendants. Mrs. Hensel and deputy Landrum were available to the state to call as witnesses and the state refused to present these witnesses, the inescapable conclusion being their testimony would have supported Craig Hensel's statements.

2. THE STATE DID NOT SATISFY ITS BURDEN OF PROVING A VALID CONSENT TO SEARCH.

A. COMMON AUTHORITY, NOT MERE OWNERSHIP IS REQUIRED FOR A THIRD PARTY TO PROVIDE A VALID CONSENT TO SEARCH.

This Court should refuse to grant certiorari in this case as the Court of Appeals has correctly decided the issue and aptly stated that one would be "hard pressed to find a more extreme case than this one in which an accused was denied the right of confrontation." Hensel, 738 P.2d at 129.

It is undisputed that the sole evidence presented by the state as to Mrs. Hensel's authority to consent to the search was her status as personal representative of the estate. Craig Hensel does not contest that Mrs. Hensel, as the personal representative of the estate, was the owner of the Ranch.

Assuming arguendo that all of Mrs. Hensel's statements were considered, she never stated that she had ever occupied or used the premises. This Court in a succession of cases has held legal ownership of the premises is not the dispositive issue in determining whether a third party's consent is valid to search the premises. See, Chapman v. United States, 365 U.S. 610 (1961); Stoner v. California, 376 U.S. 43 (1964); United States v. Matlock, 415 U.S. 164 (1874). In both Chapman and Stoner it was undisputed that the third party was the owner of the premises or the agent of the owner. In both cases the court held legal ownership is insufficient to validate a third party consent to search.

The controlling case on third party consent is United States v. Matlock, 415 U.S. 164, (1974). In Matlock, the Court stated;

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies a third party consent does not rest upon the law of property, with its attendant historical and legal refinements, see Chapman v. United States, 365 U.S. 610 L.Ed.2d 828, 81 S. Ct. 776 (1961), (landlord could not validly consent to a search of a house he has rented to another), Stoner v. California, 376 U.S. 483, 11 L. Ed.2d 856, 84 S. Ct. 889 (1964) (night hotel clerk cannot validly consent to a customer's room) but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has a right to permit the inspection in his own right in that the others have assumed that one of their number might permit the common area to be searched.

Matlock, n.7 at 171.

The United States Supreme Court has consistently held a mere proprietary interest in property does not validate the consent of a third party. See, Chapman, 365 U.S. 610; Stoner, 376 U.S. 43. New Mexico follows the Matlock analysis that mere ownership of premise standing alone does not per se establish that the person who consented to the search was authorized to do so. New Mexico v. Madrid, 91 N.M. 375, 574 P.2d 594 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978); New Mexico v. Mascarenas, 86 N.M. 375, 695 P.2d 1285 (Ct. App. 1974); New Mexico v. Johnson, 85 N.M. 465, 513 P.2d 399 (Ct. App. 1973).

The case at bar is almost identical to Stoner and Chapman. In Stoner and Chapman the party providing the third party consent was a mere proprietary owner of the premises. The sole interest Mrs. Hensel had in the premises was as personal representative of estate of Harriett Scully. There was absolutely no evidence presented that she had mutual use, joint access, control or common authority of the Scully Ranch.

In Chapman, the defendant's landlord noticed a strong odor of "whiskey mash" from defendant's house. The landlord consented to the police officers' search of Chapman's house. Chapman, 365 U.S. at 612. The government contended that the tenant was committing waste and the common law provides the landlord with the absolute right to enter the demised premises to view waste. Id. at 616. The Court stated,

> To uphold such an entry, search and seizure "without a warrant would reduce the [Fourth] Amendment to a nullity and leave [tenants] homes secure only in the discretion of [landlords]." Johnson v. United States, supra (333 U.S. at 14). Moreover, it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law, which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. We ought not to bow to them in the fair administration of the criminal law. To do so would not comport with our justly proud claim of the procedural protections accorded to those charged with crime.

Chapman, 365 U.S. at 617.

In Stoner, a hotel night clerk consented to the search of Stoner's hotel room. The Court stated,

> Nor is there any substance to the claim that the search was reasonable because the police, relying upon the night clerk's expressions of consent, had a reasonable basis for the belief that the clerk had authority to consent to the search. Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of "apparent authority.". .

Stoner, 376 U.S. at 488.

> It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent. It is true that the night clerk clearly and unambiguously consented to the search. But there is nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room.

Stoner, 376 U.S. at 489.

The New Mexico courts have also required more than a mere proprietary interest in the premises searched to validate a search and seizure by third party consent. New Mexico v. Madrid, 91 N.M. 375, 574, P.2d 594 (Ct. App). cert. denied, 91 N.M. 491, 576 P.2d 297 (1978); New Mexico v. Larson, 94 N.M. 795, 617 P.2d 1310 (1980); New Mexico v. Mascarenas, 86 N.M. 692, 526 P.2d 1285 (Ct. App. 1975); New Mexico v. Johnson, 85 N.M. 465, 513 P.2d 399 (Ct. App. 1973).

In Madrid, the wife of the defendant had consented to the search of their home. "The question of "joint possessor" or "common authority" is not to be determined on the basis of the wife's property interest in the premises." Madrid, 91 N.M. at 377. In Madrid, the wife had moved from the premises five months previously and had no ownership in the apartment. The court stated, "[t]he fact that property of the wife remained on the premises and the fact that the wife had a key to the premises prevents an inference of exclusive use." Id. The common authority or other sufficient relationship to the premises was the existence of her access to the premises and her "use" of the premises by her property remaining on the premises. Id.

In the case at bar, the state presented neither evidence of Mrs. Hensel's access to the premises nor evidence of her use of the premises. Craig Hensel's undisputed testimony was that he was living at the Scully Ranch and in consideration was performing repairs at the Ranch. Whether he received mail or paid the utility bills is of no significance. The respondent submits that many tenants neither receive mail at their apartments nor pay utility bills.

Craig Hensel was living at the Scully Ranch, had done repair work on the premises, spoke with neighbors about selling the property and had been in other Scully estate properties selling items of the estate. The house was equipped with a bed, pots, pans, food, and other items of furniture. Every witness testified that Mr. Hensel occupied the premises and was living there on the day the search of the premises was conducted.

Further, the trial court specifically found that Craig Hensel has standing to contest the search. To contest the search he had to be legitimately on the premises.

A person may assert his right against unreasonable searches and seizure when the police conduct has invaded his legitimate expectation of privacy. Rakas v. Illinois, 439 U.S. 128, (1978); New Mexico v. Waggoner, 97 N.M. 73, 636 P.2d 892 (Ct. App. 1981). The Court has emphasized that a person's expectation of privacy is at its greatest in his home and has steadfastly preserved one's privacy by suppressing unlawful searches in people's homes. Johnson v. United States, 333 U.S. 10, (1948); Mincey v. Arizona, 437 U.S. 385, (1978);

b. AN ABSENT THIRD PARTY CANNOT CONSENT TO A SEARCH WHEN THE TARGET OF THE SEARCH IS PRESENT.

Third party consent is valid against the "absent" non-consenting person. United States v. Matlock, 415 U.S. 164 (1974).

In the case at bar, Mrs. Hensel was in Roswell, New Mexico giving her consent to search premises located eighty-seven miles away in Fort Sumner, New Mexico and to the premises occupied by Craig Hensel. Counsel has been unable to locate any case where the third party was absent from the premises searched and the target of the search was present.

The only reference to such a scenario is in California v. Haskett, 640 P.2d 776 (Cal. 1982) (In Bank). Wherein the court stated,

> For instance, an absent co-tenant cannot authorize the police to burst into occupied premises unannounced if there is no emergency justifying such a frightening intrusion.

Haskett, 640 P.2d at 786.

The cases are split as to whether a present third party can consent to search of the premises when the target of the search is also present. The majority view would appear to be that a third party cannot consent when the target is present. See, United States v. Matlock, 415 U.S. 164 (1974); United States v. Impink, 728 F.2d 1228 (9th Cir. 1984); United States v. Robinson, 479 F.2d 300 (7th Cir. 1973); Silva v. Florida, 344 So.2d 559 (Fla. 1977); Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1965). But see, United States v. Sumlin, 567 F.2d 684 (6th Cir. 1977); Oregon v. Frame, 609 P.2d 831 (Or. App. 1980); New York v. Cosme, 397 N.E.2d 1319 (Ct. App. N.Y. 1979); California v. Haskett, 640 P.2d 776 (Cal. 1982).

The respondent submits that the better reasoned cases are those holding that when the target is present a third party cannot consent to the search.

In United States v. Impink, 728 F.2d 1228 (9th Cir. 1984) two narcotic agents were informed by the landlord of possible drug activity on the leased premises. The agents had consent from the landlord to look in the garage. From the observations, agents were able to conclude that a clandestine laboratory was in operation. The district court had accepted the state's argument that the landlord's consent circumvented the warrant requirement. Id. at 1232.

The Ninth Circuit citing Stoner noted that a lessor cannot consent to a search of leased premises. Impink, 728 F.2d at 1232. However, here the parties had stipulated that the landlord had reserved the right to store certain property in the garage of the residence. The court in applying the factors enunciated in United States v. Matlock, 415 U.S. 164 (1974), stated that the Matlock court had held that "the consent of one who possesses common authority over premises or effects is valid against the absent, non-consenting person with whom that authority is shared." Impink, 728 F.2d at 1232-1233. The court in Impink noted that the Matlock opinion was explicitly limited to situations where "persons generally have joint access or control for most purposes." Id. at 1233. The court held that Matlock leaves three possible variables in the consent calculus:

> First, the third party may not generally have joint access. . .for most purposes; his right of access may be narrowly prescribed. Second, the objector may not be an absent. . . person; he may be present at the time third party consent is obtained. Finally, the objector may not simply be non-consenting; he may actively oppose the search. Each of these variables have been altered between Matlock and the case before us, and each change suggest that an effective consent cannot be given in this case.

Impink, 728 F.2d at 1233.

The court noted that in this case presents a situation where a third party and the defendant did not have equal use of the place in which both are present. The court noted that a full-time caretaker and the lessee of the house were present and both had unlimited right to the premises. The court stated, "[a]s between the resident and the lessor with a narrowly proscribed right of access, there can be no doubt that the resident has the greater right of access or control for most purposes." Id. This determination is based on actual expectations of privacy rather than common law, definitions of property rights. Id. n.4 at 1233.

The court found that at every step in the investigation in this case, a person with a privacy interest superior to the third person giving consent was present during the search. Id. at 1233. The police knew at the time they began the search that the lessee of the home was present. Id. at 1234. The court stated, "when the police intentionally bypass a suspect who is present and known by them to possess a superior privacy interest, the validity of third party consent is less certain." Id.

In the case at bar, Officer Bryant had the written consent of Mrs. Hensel when he first went to the Scully Ranch and picked up Craig. He did not search the Ranch at that time. Only after he had spoken with Mrs. Hensel by telephone, and having declined to arrest Craig, did he intentionally bypass the occupants of the house to search the premises. Officer Bryant was well aware of Craig Hensel residing at the Ranch.

The Impink court contrasted the limited right of access of the third party to the full access of the defendant. In the case at bar, the contrast is impossible because there in no evidence whatsoever showing Mrs. Hensel had any right of access to the premises.

In United States v. Poole, 307 F.Supp. 1185 (E.D. La. 1969) the court held that evidence obtained in a search is inadmissible if the person having equal rights in the premises is present at the time of the search and does not consent. In Poole, the defendant was present and his consent was neither given nor sought. See also, United States v. Robinson, 479 F.2d 300 (7th Cir. 1973).

In Silva v. Florida, 344 So.2d 559 (Fla. 1977) the court stated, "[t]he justification for allowing any person to consent to a search which may result in a seizure of evidence against another is the authority that person has by virtue of his sharing dominion and control over the

premises. The law is clear that if a person whose possessions are the object of a search is absent from the premises another having joint control may validly consent to the search. Id. at 562. The court further stated,

> It is only reasonable that the person whose property is the object of a search should have controlling authority to refuse consent. His rights are personal to him and derive from the United States Constitution. . .Though a joint occupant should have authority to consent to a search of jointly held premises if the other party is unavailable, a present, objecting party should not have his constitutional rights ignored because of a leasehold or other property interest shared with another. This is particularly true where the police are aware that the person objecting is the one whose constitutional rights are at stake.

Silva, 344 So.2d at 562. (citations omitted).

In Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1966), the court held that the third party's consent to search was rescinded by his sister's express protests in her demand for a search warrant. In Donovan the third party and his sister both occupied the premises.

The courts which have allowed a third party to consent when the third party is present have not fully recognized the personal rights of the target of the search. The respondent submits that the more persuasive view is of not allowing the third party to directly invade and diminish another persons fundamental Constitutional rights. It is unreasonable to allow the warrantless search of the premises occupied by the target of the search when he is present and unwilling to allow the search of the premises.

CONCLUSION

Respondent respectfully requests this court to deny the Petition for Writ of Certiorari and affirm the decision of the New Mexico Court of Appeals.

Respectfully submitted,

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By:
DEAN E. BORDER

C E R T I F I C A T E

I hereby certify that a true and correct copy of the foregoing Response to Petition for Writ of Certiorari to the Court of Appeals of New Mexico was mailed to Charles A. Rennick, Post Office Drawer 1508, Santa Fe, New Mexico 87504-1508, on this 19th day of October, 1987.

Dean E. Border